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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF BUILDING SCIENCES IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF THE *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

STATUTES:

Public Law 93-383, 12 U.S.C. § 1701j-2 ..... *passim*
Internal Revenue Code, § 501(c)(3) 2

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF BUILDING SCIENCES IN SUPPORT OF THE PETITION FOR CERTIORARI

The National Institute of Building Sciences (the "Institute"), with the consent of all parties, files this brief *amicus curiae* in support of the petition filed by The American Society of Mechanical Engineers, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.*

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* The written consents of counsel for the parties have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The National Institute of Building Sciences was created pursuant to Section 809 of the Housing and Community Development Act of 1974, Pub. L. 93-383, 12 U.S.C. Section 1701j-2.* The Institute is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code. The Board of Directors of the Institute, during its first five years of existence, has, pursuant to its enabling statute, been appointed by the President of the United States with the advice and consent of the United States Senate.

The Institute's mission is set forth in its enabling statute. Congress therein declared the need for ". . . an authoritative national source to make findings and to advise both the public and private sectors of the economy with respect to the use of building science and technology in achieving nationally acceptable standards and other technical provisions for use in Federal, State, and local housing and building regulations . . . ." § 809(a)(1), Pub. L. 93-383. To fulfill this important national objective, Congress authorized the establishment of "an appropriate nonprofit, nongovernmental instrument to be known as the National Institute of Building Sciences . . . ." § 809(b)(1), Pub. L. 93-383.** The Institute's functions and responsibilities relating to building regulations, as set forth in its enabling statute, are as follows:

> (A) Development, promulgation, and maintenance of nationally recognized performance criteria, standards, and other technical provisions for maintenance

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* For the convenience of the Court, Section 809 of Pub. L. 93-383 is set forth as an Appendix hereto.

** This section also provided in substance that the Institute might elect to receive a Congressional charter or to incorporate under the District of Columbia Non-Profit Corporation Act. The Institute chose to incorporate under District of Columbia law on August 6, 1976.

of life, safety, health, and public welfare suitable for adoption by building regulating jurisdictions and agencies, including test methods and other evaluative techniques relating to building systems, subsystems, components, products, and materials with due regard for consumer problems.

(B) Evaluation and prequalification of existing and new building technology in accordance with subparagraph (A).

(C) Conduct of needed investigations in direct support of subparagraphs (A) and (B).

(D) Assembly, storage, and dissemination of technical data and other information directly related to subparagraphs (A), (B), and (C).

§ 809(e)(1), Pub. L. 93-383.

While the Institute itself is not a voluntary membership organization, Congress directed that the Institute establish a voluntary membership affiliate. The statute expressly requires that "the Institute shall establish . . . a Consultative Council, membership in which shall be available to representatives of all appropriate private trade, professional, and labor organizations, private and public standards, codes, and testing bodies, public regulatory agencies, and consumer groups, so as to insure a direct line of communication between such groups and the Institute and a vehicle for representative hearings on matters before the Institute." § 809(c)(8), Pub. L. 93-383. In accordance with the intent of Congress, the Consultative Council, then, consisting of voluntary representatives of the broad spectrum of public interest and disciplines interested in or affected by building criteria and standards, is the volunteer vehicle through which these objectives are accomplished.

In addition, Congress directed that the Institute, in exercising its functions and responsibilities "shall assign

and delegate, to the maximum extent possible, responsibility for conducting each of the needed activities . . . to one or more of the private organizations, institutions, agencies, and Federal and governmental entities with a capacity to exercise or contribute to the exercise of such responsibility, monitor the performance achieved through assignment and delegation, and, when deemed necessary, reassign and delegate such responsibility." § 809(e)(2), Pub. L. 93-383. Consistent with this directive, the Institute also depends upon the voluntary input of various public and private entities to fulfill its statutory responsibilities.

It is clear, therefore, that the Institute has a compelling interest in matters affecting the liability of nonprofit organizations for the unauthorized actions of their volunteer members taken, not for the benefit of the organization, but for the benefit of those members or their employers. The Institute is especially concerned in light of its obligation to carry out the will of Congress in part by delegation and in part through reliance upon the Consultative Council, which is composed of approximately 800 volunteers from the various segments of the building community who, in many instances, will have private and potentially conflicting interests.

The extent to which the Institute or its Consultative Council may be exposed to liability for any illegal or unauthorized conduct on the part of Consultative Council members may significantly undermine its ability to fulfill the important national objectives set forth by Congress in its authorizing legislation.

SUMMARY OF ARGUMENT

Volunteer, nonprofit organizations cannot reasonably protect themselves against disloyal members who exploit their volunteer positions to commit illegal and unauthorized acts against third parties, while concealing their conflicts of interest and their intentions of fostering

interests other than those of the organization. Therefore, and especially since the work of such organizations is in the public interest, they should not be liable for actions of volunteer members when (a) the acts are neither authorized nor ratified by the organization, (b) the members do not intend to, and do not in fact, benefit the organization by their actions, and (c) the members actively deceive the organization for their own purposes and benefit.

ARGUMENT

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD SERIOUSLY AFFECT THE ABILITY OF NONPROFIT ORGANIZATIONS TO PERFORM THEIR FUNCTIONS IN THE PUBLIC INTEREST.

The Institute respectfully submits that the work of voluntary organizations effectively would be crippled if they may incur liability for actions of disloyal volunteer members who improperly utilize their positions to advance unlawfully their personal interests, or those of their employers, where (a) the acts are neither authorized nor ratified by the organization, (b) the disloyal members do not intend to, and do not in fact, benefit the organization, and (c) such members actively deceive the organization to accomplish their improper objectives.

There is little question but that volunteerism in America—and particularly the voluntary housing building criteria, standards and model code system—is the envy of much of the world. In no other way has any nation been able to bring so much volunteer talent and dedicated individual effort to the advancement of technology and improvement of the quality of life without undesirable governmental intervention. By authorizing the establishment of the Institute as a private, nongovernmental entity, and in encouraging continuation of other private activity in the field, the Congress of the United States has recognized this. *See* § 809(a)(2), Pub. L. 93-383.

The informed and balanced judgments of volunteer individuals are vital to the Institute's accomplishment of its statutory mission. Complex issues such as the appropriate measures of housing and building performance, the thresholds of human and environmental tolerance and/or satisfaction, the acceptable levels of risk, and the adequacy of methods of performance prediction rarely can be completely resolved by scientific methods alone. But such questions must be resolved if society is to sustain itself and advance; to achieve such resolution, persons of knowledge and judgment must make decisions. The requisite expertise may be found in government, in industry, in the professions, in the trades, in the ranks of the owner/user, in academia, and elsewhere in the community. But because of the expense that otherwise would be associated with assembling large numbers of persons with specialized expertise and balancing points of view, voluntary participation by those with the needed talent is necessary to provide the information and debate that is vital to this process of resolution.

In order to gain credibility, organizations dealing with the development of voluntary standards should be diverse and broadly inclusive. No affected group or discipline should feel excluded. The Institute, for example, has no limit on membership on its Consultative Council, which presently has approximately 800 members.

The Institute recognizes that a voluntary organization must be responsible for its actions. This is especially true of voluntary organizations that develop or deal with criteria and standards which enjoy wide acceptance and are broadly relied upon in both the public and private sectors of the economy. The matter of volunteer organizations' responsibility for their actions, or for the duly authorized actions of their agents, however, is a quite different matter from that presently at bar. No question is raised here as to the liability of the individual

or individuals involved or their true principals. Rather, the issue presented is whether a volunteer organization can be engaged in a conspiracy violative of the antitrust laws when it is unaware of any unlawful act being perpetrated by any of its members and when such act could in no respect redound to the benefit of the organization. To hold that an organization is engaged in an unlawful conspiracy by "unintentional participation" or "apparent authority," would unduly and most unfairly burden the volunteer organization system. Indeed, the implications of the decision below are applicable not only to matters of antitrust law, but are susceptible of being extended to cases involving defamation, disparagement and other torts.

Voluntary organizations, of course, should structure their deliberative and judgmental bodies so as to avoid conflicts of interest or so that potential conflicts are fully known to everyone concerned. Every voluntary organization should have internal review procedures to ensure to the maximum extent feasible that the result of its work is a representative product of the institution, free from undisclosed bias. Such organizations should have policies and procedures, as does the Institute, based on concepts of open participation, disclosure, and checks and balances. But to require flawless operation is not realistic—individuals may choose not to participate fairly or may not provide full disclosure as to their potential conflicts or bias, and checks and balances may fail. No voluntary membership organization—however strong its desire for integrity and objectivity—can establish controls that will preclude any unfair bias or improper act by any of its members, or prevent any member from evading the organization's control or review procedures.

It is respectfully submitted that the work of voluntary organizations will be unreasonably inhibited if they are to be held liable for acts of individual members who

victimize the organization as well as others when they abuse their volunteer positions by concealing conflicts of interest and deliberately use their positions improperly to advance their personal or their employers' interests rather than those of the organization. No procedure can truly prevent a wrong-doing member from improperly exploiting his position in the volunteer organization and deceiving the organization to his own benefit or that of his true principal, if he is so disposed. As a practical matter, therefore, volunteer organizations simply are not able to protect themselves with certainty against such deceptive abuse, no matter what review procedures they maintain, if the test of agency is "apparent authority" as incorrectly perceived by a third party, rather than as held out to the third party by the principal. In cases such as that at bar, the wrongdoers really are functioning only as agents of their employers, and not of the volunteer organization.

The Institute respectfully submits that its ability to carry out the mandate of Congress would be jeopardized if it were to be exposed to liability for acts of volunteer members of its Consultative Council were they to conceal their conflicts of interest, take actions advancing their personal interests rather than those of the Institute, while improperly representing to others that they have authority to speak definitively for the Institute or its Consultative Council.

Thus the decision of the Second Circuit Court of Appeals, if allowed to stand, could have a serious adverse impact upon the ability of the Institute to carry out its fundamental mission—to work through volunteer participants in both the public and private sectors of the economy to bring about a more rational housing and building regulatory environment—Federal, State and local.

CONCLUSION

For the foregoing reasons, the petition of The American Society of Mechanical Engineers, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Public Law 93-383
93rd Congress, S. 3066
August 22, 1974

AN ACT

To establish a program of community development block grants, to amend and extend laws relating to housing and urban development, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Housing and Community Development Act of 1974".

* * * *

TITLE VIII—MISCELLANEOUS

* * * *

88 Stat. 729

NATIONAL INSTITUTE OF BUILDING SCIENCES

SEC. 809. (a)(1) The Congress finds (A) that the lack of an authoritative national source to make findings and to advise both the public and private sectors of the economy with respect to the use of building science and technology in achieving nationally acceptable standards and other technical provision for use in Federal, State, and local housing and building regulations is an obstacle to efforts by and imposes severe burdens upon all those who procure, design, construct, use, operate, maintain, and retire physical facilities, and frequently results in the failure to take full advantage of new and useful developments in technology which could improve our living environment; (B) that the establishment of model buildings codes or of a single national building code will not completely resolve the problem because of the difficulty at all

levels of government in updating their housing and building regulations to reflect new developments in technology, as well as the irregularities and inconsistencies which arise in applying such requirements to particular localities or special local conditions; (C) that the lack of uniform housing and building regulatory provisions increases the costs of construction and thereby reduces the amount of housing and other community facilities which can be provided; and (D) that the existence of a single authoritative nationally recognized institution to provide for the evaluation of new technology could facilitate introduction of such innovations and their acceptance at the Federal, State, and local levels.

(2) The Congress further finds, however, that while an authoritative source of technical findings is needed, various private organizations and institutions, private industry, labor, and Federal and other governmental agencies and entities are presently engaged in building research, technology development, testing, and evaluation, standards and model code development and promulgation, and information dissemination. These existing activities should be encouraged and these capabilities effectively utilized wherever possible and appropriate to the purposes of this section.

(3) The Congress declares that an authoritative nongovernmental instrument needs to be created to address the problems and issues described in paragraph (1), that the creation of such an instrument should be initiated by the Government, with the advice and assistance of the National Academy of Sciences-National Academy of Engineering-National Research Council (hereinafter referred to as the "Academies-Research Council") and of the various sectors of the building community, including labor and management, technical experts in building science and technology, and the various levels of government.

(b) (1) There is authorized to be established, for the purposes described in subsection (a) (3), an appropriate

nonprofit, nongovernmental instrument to be known as the National Institute of Building Sciences (hereinafter referred to as the "Institute"), which shall not be an agency or establishment of the United States Government. The Institute shall be subject to the provisions of this section and, to the extent consistent with this section, to a charter of the Congress if such a charter is requested and issued or to the District of Columbia Non-profit Corporation Act if that is deemed preferable.

(2) The Academies-Research Council, along with other agencies and organizations which are knowledgeable in the field of building technology, shall advise and assist in (A) the establishment of the Institute; (B) the development of an organizational framework to encourage and provide for the maximum feasible participation of public and private scientific, technical, and financial organizations, institutions, and agencies now engaged in activities pertinent to the development, promulgation, and maintenance of performance criteria, standards, and other technical provisions for building codes and other regulations; and (C) the promulgation of appropriate organizational rules and procedures including those for the selection and operation of a technical staff, such rules and procedures to be based upon the primary object of promoting the public interest and insuring that the widest possible variety of interests and experience essential to the functions of the Institute are represented in the Institute's operations. Recommendations of the Academies-Research Council shall be based upon consultations with and recommendations from various private organizations and institutions, labor, private industry, and governmental agencies entities operating in the field, and the Consultative Council as provided for under subsection (c) (8).

(3) Nothing in this section shall be construed as expressing the intent of the Congress that the Academies-Research Council itself be required to assume any func-

tion or operation vested in the Institute by or under this section.

(c) (1) The Institute shall have a Board of Directors (hereinafter referred to as the "Board") consisting of not less than fifteen nor more than twenty-one members, appointed by the President of the United States by and with the advice and consent of the Senate. The Board shall be representative of the various segments of the building community, of the various regions of the country, and of the consumers who are or would be affected by actions taken in the exercise of the functions and responsibilities of the Institute, and shall include (A) representatives of the construction industry, including representatives of construction labor organizations, product manufacturers, and builders, housing management experts, and experts in building standards, codes, and fire safety, and (B) members representative of the public interest in such numbers as may be necessary to assure that a majority of the members of the Board represent the public interest and that there is adequate consideration by the Institute of consumer interests in the exercise of its functions and responsibilities. Those representing the public interest on the Board shall include architects, professional engineers, officials of Federal, State, and local agencies, and representatives of consumer organizations. Such members of the Board shall hold no financial interest or membership in, nor be employed by, or receive other compensation from, any company, association, or other group associated with the manufacture, distribution, installation, or maintenance of specialized building products, equipment, systems, subsystems, or other construction materials and techniques for which there are available substitutes.

(2) The members of the initial Board shall serve as incorporators and shall take whatever actions are necessary to establish the Institute as provided for under subsection (b) (1).

(3) The term of office of each member of the initial and succeeding Boards shall be three years; except that (A) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (B) the terms of office of members first taking office shall begin on the date of incorporation and shall expire, as designated at the time of their appointment, one-third at the end of one year, one-third at the end of two years, and one-third at the end of three years. No member shall be eligible to serve in excess of three consecutive terms of three years each. Notwithstanding the preceding provisions of this subsection, a member whose term has expired may serve until his successor has qualified.

(4) Any vacancy in the initial and succeeding Boards shall not affect its power, but shall be filled in the manner in which the original appointments were made, or, after the first five years of operation, as provided for by the organizational rules and procedures of the Institute.

(5) The President shall designate one of the members appointed to the initial Board as Chairman; thereafter, the members of the initial and succeeding Boards shall annually elect one of their number as Chairman. The members of the Board shall also elect one or more of their Members as Vice Chairman. Terms of the Chairman and Vice Chairman shall be for one year and no individual shall serve as Chairman or Vice Chairman for more than two consecutive terms.

(6) The members of the initial or succeeding Boards shall not, by reason of such membership, be deemed to be employees of the United States Government. They shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Board pursuant to this section, be entitled to receive compensation at the rate of $100 per day including

traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, equal to that authorized under section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(7) The Institute shall have a president and such other executive officers and employees as may be appointed by the Board at rates of compensation fixed by the Board. No such executive officer or employee may receive any salary or other compensation from any source other than the Institute during the period of his employment by the Institute.

(8) The Institute shall establish, with the advice and assistance of the Academies-Research Council and other agencies and organizations which are knowledgeable in the field of building technology, a Consultative Council, membership in which shall be available to representatives of all appropriate private trade, professional, and labor organizations, private and public standards, code, and testing bodies, public regulatory agencies, and consumer groups, so as to insure a direct line of communication between such groups and the Institute and a vehicle for representative hearings on matters before the Institute.

(d) (1) The Institute shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Institute shall inure to the benefit of any director, officer, employee, or other individual except as salary or reasonable compensation for services.

(3) The Institute shall not contribute to or otherwise support any political party or candidate for elective public office.

(e) (1) The Institute shall exercise its functions and responsibilities in four general areas, relating to building regulations, as follows:

(A) Development, promulgation, and maintenance of nationally recognized performance criteria, standards, and other technical provisions for maintenance of life, safety, health, and public welfare suitable for adoption by building regulating jurisdictions and agencies, including test methods and other evaluative techniques relating to building systems, subsystems, components, products, and materials with due regard for consumer problems.

(B) Evaluation and prequalification of existing and new building technology in accordance with subparagraph (A).

(C) Conduct of needed investigations in direct support of subparagraphs (A) and (B).

(D) Assembly, storage, and dissemination of technical data and other information directly related to subparagraphs (A), (B), and (C).

(2) The Institute in exercising its functions and responsibilities described in paragraph (1) shall assign and delegate, to the maximum extent possible, responsibility for conducting each of the needed activities described in paragraph (1) to one or more of the private organizations, institutions, agencies, and Federal and other governmental entities with a capacity to exercise or contribute to the exercise of such responsibility, monitor the performance achieved through assignment and delegation, and, when deemed necessary, reassign and delegate such responsibility.

(3) The Institute in exercising its functions and responsibilities under paragraphs (1) and (2) shall (A) give particular attention to the development of methods for encouraging all sectors of the economy to cooperate with the Institute and to accept and use its technical findings, and to accept and use the nationally recognized performance criteria, standards, and other technical pro-

visions developed for use in Federal, State, and local building codes and other regulations which result from the program of the Institute; (B) seek to assure that its actions are coordinated with related requirements which are imposed in connection with community and environmental development generally; and (C) consult with the Department of Justice and other agencies of government to the extent necessary to insure that the national interest is protected and promoted in the exercise of its functions and responsibilities.

(f) (1) The Institute is authorized to accept contracts and grants from Federal, State, and local governmental agencies and other entities, and grants and donations from private organizations, institutions, and individuals.

(2) The Institute may, in accordance with rates and schedules established with guidance as provided under subsection (b) (2), establish fees and other charges for services provided by the Institute or under its authorization.

(3) Amounts received by the Institute under this section shall be in addition to any amounts which may be apropriated to provide its initial operating capital under subsection (h).

(g) (1) Every department, agency, and establishment of the Federal Government, in carrying out any building or construction, or any building- or construction-related programs, which involves direct expenditures, and in developing technical requirements for any such building or construction, shall be encouraged to accept the technical findings of the Institute, or any nationally recognized performance criteria, standards, and other technical provisions for building regulations brought about by the Institute, which may be applicable.

(2) All projects and programs involving Federal assistance in the form of loans, grants, guarantees, insur-

ance, or technical aid, or in any other form, shall be encouraged to accept, use, and comply with any of the technical findings of the Institute, or any nationally recognized performance criteria, standards, and other technical provisions for building codes and other regulations brought about by the Institute, which may be applicable to the purposes for which the assistance is to be used.

(3) Every department, agency, and establishment of the Federal Government having responsibility for building or construction, or for building- or construction-related programs, is authorized and encouraged to request authorization and appropriations for grants to the Institute for its general support, and is authorized to contract with and accept contracts from the Institute for specific services where deemed appropriate by the responsible Federal official involved.

(4) The Institute shall establish and carry on a specific and continuing program of cooperation with the States and their political subdivisions designed to encourage their acceptance and its technical findings and of nationally recognized performance criteria, standards, and other technical provisions for building regulations brought about by the Institute. Such program shall include (A) efforts to encourage any changes in existing State and local law to utilize or embody such findings and regulatory provisions; and (B) assistance to States in the development of inservice training programs for building officials, and in the establishment of fully staffed and qualified State technical agencies to advise local officials on questions of technical interpretation.

(h) There is authorized to be appropriated to the Institute not to exceed $5,000,000 for the fiscal year 1975, and $5,000,000 for the fiscal year 1976 (with each appropriation to be available until expended), to provide the Institute with initial capital adequate for the exercise of its functions and responsibilities during such

years; and thereafter the Institute shall be financially self-sustaining through the means described in subsection (f).

(i) The Institute shall submit an annual report for the preceding fiscal year to the President for transmittal to the Congress within sixty days of its receipt. The report shall include a comprehensive and detailed report of the Institute's operations, activities, financial condition, and accomplishments under this section and may include such recommendations as the Institute deems appropriate.